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ARTICLES

FINDING THE PROPER FORUM FOR REGULATION OF U.S. GREENHOUSE GAS EMISSIONS: THE LEGAL AND ECONOMIC IMPLICATIONS OF *MASSACHUSETTS V. EPA*

George F. Allen *

Marlo Lewis **

I. INTRODUCTION

Environmental and energy policy debate in recent years has focused on the regulation of greenhouse gas (“GHG”) emissions, and economic considerations have weighed prominently in the political discourse. Most discussion about the costs of restricting emissions of carbon dioxide (“CO₂”) and other GHGs has focused on proposed carbon cap-and-trade schemes. Both government and private-sector economists have estimated the economic impacts of the Kyoto Protocol,¹ the Lieberman-Warner Climate Security Act of 2007,² and the Waxman-Markey American Clean Energy and Security Act of 2009,³ among other proposals.⁴ Partly because in-

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1. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

2. America’s Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

3. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

4. See AM. COUNCIL FOR CAPITAL FORMATION & NAT’L ASS’N OF MFRS., ANALYSIS OF THE WAXMAN-MARKEY BILL: “THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009” (H.R. 2454) USING THE NATIONAL ENERGY MODELING SYSTEM 4, 21 (2009), available at http://www.acf.org/media/dynamic/3/media_387.pdf (concluding that the Waxman-

tractable uncertainties would frustrate modeling efforts, less attention has been paid to the costs of litigation-driven GHG regulation under the Clean Air Act (“CAA”).⁵ Yet the economic impacts of CAA regulation potentially far exceed those associated with any global warming or climate change bill Congress is currently considering.⁶ Moreover, GHG controls under the CAA may be unavoidable unless the elected members of Congress enact legislation specifically establishing parameters or preempting such regulation by an unelected bureaucracy.⁷

In light of these concerns, this article addresses the manner in which the CAA became the current conduit for the regulation of CO₂ emissions, discussing the holding of *Massachusetts v. EPA* in Part II. This part subsequently details the regulatory consequences of that decision: the manner in which the U.S. Environmental Protection Agency (“EPA”) has addressed the mandate of the Supreme Court, the issues involving the application of the CAA to pollutants it was not designed to address, and the administrative and economic implications of regulating GHGs under the existing statute. In sum, this piece demonstrates that for economic, legal, and prudential reasons, the CAA is an unsuitable instrument for addressing GHG emissions in the United States.

II. CARBON DIOXIDE REGULATION VIA THE CLEAN AIR ACT AND FEDERAL COMMON LAW CAN LEAD TO ECONOMIC DISASTER AND A CONSTITUTIONAL CRISIS

A. *Massachusetts v. EPA: The Origin of U.S. Carbon Regulation*

EPA’s current action regarding CO₂ emissions stems directly from *Massachusetts v. EPA*, wherein the Supreme Court of the United States, by a 5-4 majority, held that GHGs are “air pollu-

Markey bill will result in significant GDP and job losses); CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2454 AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 10 & tbl.2 (2009) [hereinafter CBO COST ESTIMATE]; DAVID W. KREUTZER ET AL., HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 2, 12, 13 (2009), available at http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf (discussing why the aforementioned analyses arrive at different results).

5. See *infra* Part II.B.1.

6. See CBO COST ESTIMATE, *supra* note 4, at 10–11; *infra* Part II.B.

7. See *infra* Part II.A.

tants” within the meaning of the CAA,⁸ and gave EPA three options: (1) issue a finding that GHG-related air pollution “may reasonably be anticipated to endanger public health or welfare,”⁹ (2) issue a finding of no endangerment,¹⁰ or (3) provide a “reasonable explanation” for why the agency cannot or will not exercise its discretion to make such a determination.¹¹

Furthermore, the Supreme Court held that if EPA makes an endangerment finding, it has an attendant obligation, pursuant to section 202 of the CAA, to develop and implement GHG emission standards for new motor vehicles.¹²

Although the Court did not require the agency to make an endangerment determination, EPA—under Administrator Lisa Jackson—issued an endangerment proposal,¹³ a proposed rule establishing GHG emission standards for new motor vehicles,¹⁴ and a proposed “Tailoring Rule” to shield small stationary sources of CO₂ from CAA permitting requirements that Congress intended to apply only to large industrial facilities.¹⁵

B. *The Ensuing Regulatory Cascade*

In *Massachusetts v. EPA*, respondent EPA, citing *FDA v. Brown & Williamson Tobacco Corp.*,¹⁶ argued that regulating U.S. energy use based on the carbon content of fuels or emissions was a decision of such great “economic and political significance” that Congress would not delegate to an administrative agency in “so cryptic a fashion.”¹⁷ Petitioners, in contrast, insisted that the case

8. 549 U.S. 497, 528–29 (2007).

9. *Id.* at 528, 532–33.

10. *Id.* at 533.

11. *Id.*

12. *Id.*

13. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

14. Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600).

15. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71) [hereinafter Tailoring Rule].

16. 529 U.S. 120 (2000).

17. Brief for the Federal Respondent at 21, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120); see *Control of Emissions from New Highway Vehicles and Engines*,

simply concerned one subset of mobile emission sources (new motor vehicles) under one provision of the CAA, section 202.¹⁸

Beguiled by the seemingly narrow focus of the case, the Court concluded that an endangerment finding would not lead EPA to undertake “extreme measures,” only to regulate GHG emissions from new motor vehicles.¹⁹ Rejecting EPA’s argument that the CAA was not intended to address GHG emissions under the agency’s authority to regulate “air pollution agent[s],” the Court noted the broad and adaptable character of the statutory language at issue.²⁰ Moreover, the Court stated, EPA would be constrained under section 202 to give “appropriate consideration” to compliance costs and technological feasibility.²¹ The only practical consequence of a decision in favor of petitioners, the Court suggested, would be a cost-constrained modification of new-car fuel-economy standards.²²

This assessment by the Court now seems naïve. The CAA is a highly interconnected statute. As attorney Peter Glaser documented in congressional testimony in late 2007 and early 2008,²³ and as EPA’s July 2008 Advanced Notice of Proposed Rulemaking (“ANPR”) amply confirmed,²⁴ once EPA starts regulating CO₂ under one provision of the CAA, it will have to regulate CO₂ under multiple provisions.²⁵ For example, an endangerment finding under section 202 would provide precedent for similar findings

68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) (quoting *Brown & Williamson*, 529 U.S. at 160).

18. Brief for the Petitioners at 19–20, *Massachusetts*, 549 U.S. 497 (2007) (No. 05-1120).

19. *Massachusetts*, 549 U.S. at 531.

20. *Id.* at 528–29.

21. *Id.* at 531 (citing 42 U.S.C. § 7521(a)(2) (2006)).

22. *Id.* (citing 42 U.S.C. § 7521(a)(2)).

23. *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. 93, 98–99 (2008) (statement of Peter Glaser, Partner, Troutman Sanders LLP) [hereinafter *Energy and Commerce Hearing*]; *Massachusetts v. U.S. EPA Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. (2008) (statement of Peter Glaser, Partner, Troutman Sanders LLP); *EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 172, 179 (2007) (statement of Peter Glaser and John Cline, Partners, Troutman Sanders LLP).

24. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,432 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1) [hereinafter ANPR].

25. See *Energy and Commerce Hearing*, *supra* note 23, at 99–112.

that would either require or authorize EPA to regulate GHG emissions from heavy-duty trucks, off-road vehicles, marine vessels, aircraft, and the like under other Title II provisions.²⁶

1. Prevention of Significant Deterioration

The regulatory chain reaction would not be limited to mobile sources. By definition, when EPA establishes GHG emission standards for new motor vehicles, CO₂ becomes an air pollutant subject to regulation under the CAA.²⁷ As a CAA-regulated air pollutant, CO₂ would consequently be “subject to regulation” under the CAA prevention of significant deterioration (“PSD”) pre-construction permitting program for stationary GHG-emitting sources.²⁸

To comply with the CAA, a firm must first obtain a PSD permit from EPA or a state environmental protection agency before constructing a new “major stationary [emissions] source,” or modifying an existing source in a manner that significantly increases emissions.²⁹ A PSD source is “major” under the CAA if (1) it may emit 100 tons per year (“tpy”) of a pollutant and falls within one of twenty-eight enumerated categories, or (2) it is any other type of facility and has the potential to emit 250 tpy of an air pollutant.³⁰

Large industrial facilities, in the course of operation, easily have the potential to release the threshold 250 tpy of damaging air pollutants such as sulfur dioxide and particulate matter, but few if any small manufacturers and no commercial or residential facilities do.³¹ However, an immense number and variety of entities—including office buildings, hotels, large retail stores,

26. See ANPR, *supra* note 24, at 44,432–33 (discussing the use of Title II and section 202(a) to regulate mobile sources of GHG emissions); see also *id.* at 44,453–58 (providing a more detailed discussion from heavy-duty trucks); *id.* at 44,458–60 (discussing the use of Title II and section 202(a) to regulate marine vessels); *id.* at 44,460–74 (discussing the use of Title II and section 202(a) to regulate off-road vehicles and the engines used in various marine vessels and aircraft).

27. See *id.* at 44,367 (noting that an endangerment finding under section 202(a) may trigger further regulation of the GHG emissions from stationary sources).

28. See *id.*

29. See 40 C.F.R. § 52.21 (2009); see also 42 U.S.C. § 7475 (2006).

30. 40 C.F.R. § 52.21(b)(1)(i).

31. See PORTIA M.E. MILLS & MARK P. MILLS, U.S. CHAMBER OF COMMERCE, A REGULATORY BURDEN: THE COMPLIANCE DIMENSION OF REGULATING CO₂ AS A POLLUTANT 7–10 (2008), available at http://www.uschamber.com/publications/reports/0809_CO2report.pdf.

enclosed shopping malls, small manufacturing firms, and commercial kitchens—have the potential to reach 250 tpy of CO₂ emissions.³² A recent study conducted by the U.S. Chamber of Commerce estimates that 1.2 million buildings and facilities—the vast majority of which are not currently subject to PSD regulation—emit at least 250 tpy of CO₂.³³ Once EPA adopts GHG emission standards, these 1.2 million entities will be vulnerable to new regulation, potential litigation, and penalties.³⁴

Firms seeking to obtain a PSD permit must determine their course of compliance with “best available control technology” (“BACT”) standards.³⁵ Thus, each affected source typically must undertake a complex, technical investigation.³⁶ In addition to the sometimes substantial technology investments necessary for compliance with BACT standards, firms face the expensive and protracted PSD permitting process. Analyzing PSD permits, EPA estimates that each permit requires an average of 866 hours, costs sources \$125,120 on average, and represents a processing burden of 301 hours and \$23,280 for EPA or a state environmental agency.³⁷ Few small businesses could operate under the PSD administrative burden and those enterprises that did obtain a permit would likely impose some of the additional cost on American consumers with higher prices.

Adopting GHG standards for new motor vehicles could also expand the magnitude and scope of the Title V operating permits program. Sources subject to Title V must obtain a permit to operate.³⁸ An entity is a “major” emitting facility for Title V purposes if it has the potential to emit 100 tpy of a CAA-regulated air pollutant.³⁹ EPA’s Tailoring Rule estimates that, once CO₂ becomes a CAA-regulated air pollutant, the number of entities subject to

32. *Id.* at 11–13.

33. *Id.* at 3–5.

34. *Id.* at 3.

35. See U.S. ENVTL. PROT. AGENCY, NEW SOURCE REVIEW WORKSHOP MANUAL: PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA PERMITTING 4 (1990), available at <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>.

36. See *id.* at B.1–B.74 (detailing the BACT process).

37. CARRIE WHEELER, U.S. ENVTL. PROT. AGENCY, INFORMATION COLLECTION REQUEST FOR PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT NEW SOURCE REVIEW 16–20 (2010), available at <http://www.uschamber.com/assets/env/supportingreport.pdf>.

38. See ANPR, *supra* note 24, at 44,377.

39. See Tailoring Rule, *supra* note 15, at 55,298.

Title V regulation will expand from roughly 14,700 to 6.1 million sources.⁴⁰

Generally, the Title V program is designed to facilitate compliance with other programs by consolidating all of an entity's CAA requirements in a single permit, not to create new obligations for affected sources.⁴¹ However, if 6.1 million entities become major emitting facilities because they emit 100 tpy of CO₂, nearly 98% of all entities requiring Title V permits will not have any other CAA obligations on which to report.⁴² Furthermore, these entities would be required to pay emission fees in aid of the Title V administrative costs.⁴³ Fees are currently assessed at \$43.75 per ton of emissions,⁴⁴ but EPA may reduce this amount for smaller entities.⁴⁵

Under PSD, permitting agencies are to conduct BACT determinations on a "case-by-case" basis⁴⁶ and hold a "public hearing" on the air quality impact of each source and its proposed technology controls.⁴⁷ Under Title V, agencies are to provide for public comment on permit applications,⁴⁸ and "any person" may petition EPA to challenge the legality of an approved permit.⁴⁹ Scenarios are easily imagined in which these provisions empower activists to block or delay new construction and investment. More critically, as discussed below, the sheer volume of permit applications would overload and crash EPA and state permitting programs, slamming the brakes on development, investment, and jobs.⁵⁰

2. NAAQS: Is 350 the New 450?

Petitioners in *Massachusetts v. EPA* claimed the case dealt solely with emissions from new motor vehicles, arguing, for example, that "[t]he NAAQS [National Ambient Air Quality Stan-

40. *See id.* at 55,316.

41. *See id.* at 55,298.

42. *See id.* at 55,316.

43. *See* 42 U.S.C. § 7661a(b) (2006).

44. *See* Tailoring Rule, *supra* note 15, at 55,346.

45. 42 U.S.C. § 7661f(f).

46. *Id.* § 7479(3).

47. *Id.* § 7475(a)(2).

48. *See id.* § 7661a(b)(6).

49. *Id.* § 7661a(b)(6)-(7).

50. *See* Tailoring Rule, *supra* note 15, at 55,308.

dards] program is an entirely separate program from the mobile source program at issue in this case.”⁵¹ That was an incorrect assertion.

As aforesaid, GHG regulation of motor vehicles would trigger PSD regulation of CO₂, and PSD is an essential adjunct of the NAAQS program.⁵² The basic purpose of the PSD program is to prevent “significant deterioration” of air quality in areas that must comply with NAAQS.⁵³

More importantly, the endangerment finding prerequisite to establishing GHG emissions standards for new motor vehicles would set a precedent for similar endangerment findings under other CAA provisions, including section 108, which governs the first phase of NAAQS rulemaking.⁵⁴

CAA section 108 requires EPA to establish NAAQS if emissions of an air pollutant from “numerous or diverse mobile or stationary sources” cause or contribute to “air pollution which may reasonably be anticipated to endanger public health or welfare.”⁵⁵ New motor vehicles—the emission sources at issue in *Massachusetts v. EPA*—obviously qualify as numerous mobile sources for purposes of section 108.⁵⁶ In addition, EPA’s endangerment finding asserts that “elevated concentrations” of GHG emissions in the atmosphere endanger public health and welfare.⁵⁷ In this context, “elevated” means higher than pre-industrial concentrations, and thus includes present-day GHG concentrations.⁵⁸ EPA has already made the substantive case for economy-wide GHG regulation under the NAAQS program.

NAAQS is an allowable pollution concentration standard. It determines how many parts per million (“ppm”) of a targeted pollu-

51. Brief for the Petitioners, *supra* note 18, at 28.

52. See 42 U.S.C. § 7470(1).

53. See *id.* § 7470(4).

54. *Id.* § 7408.

55. *Id.* § 7408(a)(1)(A)–(B).

56. See *Massachusetts*, 549 U.S. at 505 (considering “whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles”); see also 42 U.S.C. § 7408(a)(1) (describing when EPA is required to establish NAAQS).

57. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

58. See *id.* at 66,517.

tant are permissible in the ambient air.⁵⁹ Petitioners in *Massachusetts v. EPA* asserted that current GHG levels currently harm public health and welfare.⁶⁰ Similarly, several endangerment petitions filed since *Massachusetts v. EPA* (to regulate GHG emissions from aircraft, marine vessels, off-road engines, and heavy-duty trucks) claim that GHG emissions already harm public health and welfare.⁶¹ Numerous environmental organizations and activists now argue that climate policy in general and NAAQS regulation in particular should aim to lower CO₂ concentrations from today's level (roughly 387 ppm) to 350 ppm by 2050.⁶² In December 2009 two environmental groups, the Center for Biological Diversity and 350.org, petitioned EPA to establish NAAQS for GHGs, including NAAQS for CO₂ set at 350 ppm.⁶³

Attaining a CO₂ NAAQS set at 350 ppm would require "extreme measures."⁶⁴ Even stabilization at 450 ppm may not be attainable at an acceptable cost, as *Newsweek* reporter Sharon Begley learned when she interviewed Cal Tech chemist Nathan Lewis:

Lewis's numbers show the enormous challenge we face. The world used 14 trillion watts (14 terawatts) of power in 2006. Assuming minimal population growth (to 9 billion people), slow economic growth (1.6 percent a year, practically recession level) and—this is key—unprecedented energy efficiency (improvements of 500 percent relative to current U.S. levels, worldwide), it will use 28 terawatts in 2050. (In a business-as-usual scenario, we would need 45 terawatts.) Simple physics shows that in order to keep CO₂ to 450 ppm, 26.5 of those terawatts must be zero-carbon. That's a lot of solar, wind, hydro, biofuels and nuclear, especially since renewables kicked in a measly 0.2 terawatts in 2006 and nuclear provided 0.9 terawatts. Are you a fan of nuclear? To get 10 terawatts, less than half of what we'll need in 2050, Lewis calculates, we'd have to build 10,000

59. See, e.g., 40 C.F.R. § 50.4 (2009) (setting the national primary ambient air quality standards for sulfur oxides at 0.030 ppm); *id.* § 50.11 (setting the national primary ambient air quality standards for nitrogen dioxide at 0.053 ppm).

60. 549 U.S. at 521, 525.

61. See ANPR, *supra* note 24, at 44,399.

62. The Center for Biological Diversity, for example, heads a "350 or Bust" coalition. See Center for Biological Diversity, 350 or Bust, http://www.biologicaldiversity.org/programs/climate_law_institute/350_or_bust/index.html (last visited Feb. 25, 2010).

63. Center for Biological Diversity & 350.org, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, at i, 19–24 (Dec. 2, 2009), available at http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

64. This is exactly what the Court in *Massachusetts v. EPA* thought would not happen. 549 U.S. at 531.

reactors, or one every other day starting now. Do you like wind? If you use every single breeze that blows on land, you'll get 10 or 15 terawatts. Since it's impossible to capture all the wind, a more realistic number is 3 terawatts, or 1 million state-of-the art [sic] turbines, and even that requires storing the energy—something we don't know how to do—for when the wind doesn't blow. Solar? To get 10 terawatts by 2050, Lewis calculates, we'd need to cover 1 million roofs with panels *every day* from now until then. "It would take an army," he says. Obama promised green jobs, but still.⁶⁵

Note also that under the CAA, regulated entities cannot wait until 2050 to attain a NAAQS for CO₂.⁶⁶ Rather, all areas in non-attainment with a "primary" or health-based NAAQS must come into attainment within five years, or at most ten years if EPA grants an extension.⁶⁷ Because GHGs tend to be long-lived in the global atmosphere, even if the entire world somehow magically reduced annual emissions to 1957 levels (67% below 2002 levels), global CO₂ concentrations would still increase to 455 ppm by 2100.⁶⁸ Even a complete collapse of the global economy may not be enough to lower CO₂ concentrations to 350 ppm in ten years.⁶⁹

Under such a scenario, one consequence of the nation's non-attainment with NAAQS for CO₂ is that EPA would be required to regulate major stationary CO₂ sources pursuant to the Non-Attainment New Source Review ("NNSR") pre-construction permitting program, a regime more restrictive than PSD.⁷⁰ Regula-

65. Sharon Begley, *We Can't Get There from Here; Political Will and a Price on CO₂ Won't Be Enough To Bring About Low-Carbon Energy Sources*, NEWSWEEK, Mar. 14, 2009, at 48.

66. See 42 U.S.C. § 7514a (2006).

67. *Id.* § 7502(a)(2)(A).

68. See World Climate Report, *Dialing in Your Own Climate* (April 10, 2006), <http://www.worldclimatereport.com/index.php/2006/04/10/dialing-in-your-own-climate/> (offering tables and examples that predict global CO₂ concentrations in relation to annual emissions).

69. See TÄLLBERG Found., *Isn't 350 PPM Simply Unworkable?*, <http://tallbergfoundation.org/Default.aspx?tabid=463> (last visited Feb. 25, 2010) (illustrating atmospheric CO₂ decay and the difficulty in phasing out coal use). *But see, e.g.*, FRANK ACKERMAN ET AL., ECONS. FOR EQUITY & ENV'T, *THE ECONOMICS OF 350: THE BENEFITS AND COSTS OF CLIMATE STABILIZATION* 2, 5–6, 21 (2009). Both of these sources discuss the goal of reaching 350 ppm by 2050.

70. See Annise Katherine Maguire, *Permitting Under the Clean Air Act: How Current Standards Impose Obstacles to Achieving Environmental Justice*, 14 MICH. J. RACE & L. 255, 266 (2009). Compare U.S. ENVTL. PROT. AGENCY, NONATTAINMENT NSR BASIC INFORMATION (2009), available at <http://www.epa.gov/nsr/naa.html> (explaining how nonattainment NSR requirements are customized for each nonattainment area and require basic minimums), with 42 U.S.C. § 7475 (setting forth preconstruction requirements for PSA).

tion of major sources subject to NNSR begins at 100 tpy, not the 250 tpy threshold that would apply to most CO₂ sources regulated under the PSD program.⁷¹ NNSR-regulated entities must comply with Lowest Achievable Emission Rate standards, which are more stringent than BACT because EPA may not take compliance costs into account.⁷² Moreover, major sources would have to “offset” any emissions increase from a new or modified source by reducing emissions from an existing source somewhere else.⁷³ Ergo, no facilities could be built or expanded anywhere in the nation unless something else shuts down. NNSR would become a de facto moratorium on growth, investment, and jobs.

Although states may take costs into account when developing their plans to implement NAAQS, EPA is prohibited from considering costs when setting NAAQS.⁷⁴ Initiate a rulemaking to establish primary (health-based) NAAQS for GHG emissions, and there is, in principle, no limit to the job and GDP losses that EPA, litigators, and courts could impose on the U.S. economy.

3. EPA’s Tailoring Rule Quagmire

In the July 2008 ANPR, EPA estimated that if CO₂ becomes a CAA-regulated air pollutant, PSD permit applications would increase by an “order of magnitude”—from 200–300 to 2000–3000 per year—and Title V permit applications could increase from 15,000 to 550,000 per year.⁷⁵ EPA warned that even a ten-fold increase in applications for PSD permits could “*overwhelm permitting authorities,*” creating an administrative logjam and attendant uncertainties that would delay numerous projects.⁷⁶

EPA’s October 2009 Tailoring Rule reveals that the actual threat to economic development is much greater: “If PSD and title V requirements apply [to CO₂] at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude

71. See 42 U.S.C. § 7479(1); 40 C.F.R. § 52.21 (2009); see also Tailoring Rule, *supra* note 15, at 55,292.

72. See 42 U.S.C. § 7501(3); *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 465, 486 (2001).

73. 42 U.S.C. § 7503(c).

74. See *Whitman*, 531 U.S. at 465, 486.

75. ANPR, *supra* note 24, at 44,499, 44,511.

76. *Id.* at 44,507 (emphasis added).

greater than their current administrative resources could accommodate.”⁷⁷ EPA now estimates that PSD permit applications could jump from roughly 300 to 41,000 per year—more than a 140-fold increase.⁷⁸ In addition, Title V permit applications would grow from 15,000 to 6.1 million per year—a 400-fold increase.⁷⁹ The “enormous numbers of these permit applications” would “vastly exceed the current administrative resources of the permitting authorities.”⁸⁰

Assuming that the average new Title V permit for commercial or residential CO₂ sources would require permitting agencies 43 hours to process, or 10% of the time needed for the average industrial permit, EPA estimates that the “total nationwide additional burden for permitting authorities for title V permits from adding GHG emissions at the 100-tpy threshold would be 340 million hours, which would cost over \$15 billion.”⁸¹ Note that permitting agencies would be spending all that time and money to process the permits of applicants who have essentially nothing to report, because they have no other obligations under the CAA. A more egregious case of government waste would be hard to find.

C. *Absurd Results*

In the Tailoring Rule, EPA proposes to suspend, over a six-year period, the PSD and Title V requirements for GHG sources emitting less than 25,000 tpy, on a CO₂-equivalent basis.⁸² EPA will subsequently develop “streamlining” options enabling compliance for progressively smaller sources.⁸³ Presumably, EPA will also lobby Congress for bigger budgets to increase staff and other administrative resources.

An obvious question arises: Under what authority may EPA deviate so blatantly from the text of the statute? In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court held that administrative agencies have considerable discretion to interpret statutes where the text is “silent or ambiguous

77. Tailoring Rule, *supra* note 15, at 55,292.

78. *Id.* at 55,301.

79. *Id.* at 55,295, 55,304.

80. *Id.* at 55,294.

81. *Id.* at 55,302.

82. *Id.* at 55,292.

83. *See id.* at 55,296.

with respect to the specific issue.”⁸⁴ However, there is nothing ambiguous about the 250 tpy standard already established under the Clean Air Act.

Although the Tailoring Rule does not present it this way, EPA is proposing to *amend* the CAA, since nothing in the Act authorizes EPA to dilute (“streamline”), much less suspend, specific statutory requirements.⁸⁵ EPA repeatedly asserts that it must depart from a “literal” application of the PSD and Title V regulatory thresholds.⁸⁶ But “literal” is just a euphemism for “legal” or “lawful.” To justify this assumption or usurpation of legislative power, EPA invokes the judicial doctrines of “absurd results” and “administrative necessity.”⁸⁷

EPA argues that applying the law as written to CO₂ sources would produce two kinds of absurd results. First, EPA would be forced to violate other statutory requirements. Specifically, CAA section 165(c) requires that the permitting authority grant or deny any completed permit application for a major emitting facility not later than one year after the date of filing the application.⁸⁸ “A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 tpy levels for GHG sources would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under this 12-month deadline”⁸⁹ Similarly, a literal application of the Title V 100 tpy threshold in CAA sections 502(a), 501(2)(B), and 302(j) would clash with CAA section 503(c), which imposes a time limit of 18 months after a permit application is filed for permitting authorities to issue or deny the permit.⁹⁰ “It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits.”⁹¹

84. 467 U.S. 837, 843 (1984).

85. See Tailoring Rule, *supra* note 15, at 55,294.

86. *Id.* at 55,295.

87. *Id.*

88. 42 U.S.C. § 7475(c) (2006).

89. Tailoring Rule, *supra* note 15, at 55,308.

90. See *id.* at 55,310 (citing 42 U.S.C. § 7661b(c)).

91. *Id.* at 55,310.

Literal and thus lawful application of PSD and Title V requirements to CO₂ would also be “absurd” in the sense that the consequences would demonstrably conflict with congressional intent under the CAA. The Tailoring Rule provides several examples. First, the PSD program is supposed to “insure that economic growth will occur,” albeit “in a manner consistent with the preservation of existing clean air resources.”⁹² However, because PSD is a preconstruction requirement,

increasing permitting authorities’ workload from 300 to 41,000 permits would severely undermine this purpose of facilitating economic growth Each year, many thousands of sources would face multi-year delays in receiving their permits, and as a result, for all practical purposes, they would be forced to place on hold indefinitely their plans to construct or modify.⁹³

Further, Congress designed PSD to apply to large industrial facilities, “which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation’s air.”⁹⁴ Congress wanted to exclude small entities from PSD regulation.⁹⁵ Congress intended through Title V to improve CAA compliance by consolidating all of an entity’s CAA requirements into a single permit.⁹⁶ However, the vast majority of the 6.1 million CO₂ sources that would have to apply for Title V permits have no existing CAA requirements.⁹⁷ Compelling them to apply for operating permits “would not improve compliance.”⁹⁸

In fact, compliance would be undermined. Many sources that Congress did intend for EPA to regulate would not be regulated due to the enormous backlogs resulting from the application of PSD and Title V to a myriad of sources. Congress did not intend for EPA to regulate.⁹⁹

It is beyond question that applying current CAA permitting programs to CO₂—the inevitable outcome of establishing GHG

92. 42 U.S.C. § 7470(3).

93. Tailoring Rule, *supra* note 15, at 55,308.

94. *Id.* (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980)).

95. *Id.* at 55,308–09.

96. *See id.* at 55,298.

97. *See id.* at 55,316.

98. *Id.* at 55,311.

99. *See id.*

standards for new motor vehicles—would produce absurd results. However, the source of this problem is largely ignored: *Massachusetts v. EPA*.

EPA is entirely correct: Congress did not intend to apply PSD and Title V to small entities, did not intend for those programs to crash under their own weight, and did not intend for PSD to stifle economic growth.¹⁰⁰ And Congress never intended for EPA to control CO₂ emissions under the CAA!¹⁰¹ Congressional support for regulatory climate policy is much stronger today than it was in 1970 and 1977, when Congress enacted and amended CAA section 202.¹⁰² Yet even today, the prospects for cap-and-trade legislation and for U.S. ratification of a successor treaty to the Kyoto Protocol remain in doubt.¹⁰³ The notion that Congress, in 1970 or 1977, implicitly authorized EPA to adopt economy-wide, or even industry-specific, controls on CO₂ is ludicrously unfounded.¹⁰⁴

Only once has Congress directed EPA to regulate based on the carbon content of the regulated activity—the renewable fuel standard (“RFS”) established by the Energy Independence and Security Act of 2007 (“EISA”).¹⁰⁵ Enacted months after *Massachusetts v. EPA* was decided, RFS mandates the sale of renewable fuels, which must achieve specified percentage reductions in GHG emissions, based on a life-cycle analysis, compared to petroleum-based fuels.¹⁰⁶ However, EISA section 210(b)(12) makes clear that

100. See *id.* at 55,308.

101. See, e.g., *id.*

102. See, e.g., Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 74 (2007) (“As this is being written, the wheels of federal climate regulation are already in motion.”); Scott H. Segal, *Be Cool! Staying Open Minded About Climate Policy Development*, 18 DUKE ENVTL. L. & POL’Y F. 307, 307 (2008). For a brief overview of bills making their way through Congress, see generally *New Democratic Leaders Call for Tough Climate-Change Legislation*, ISSUES IN SCI. & TECH., at 23–24 (2007), available at <http://www.issues.org/23.3/hill.html> (last visited Feb. 25, 2010).

103. See, e.g., Darren Samuelsohn, *Sen.-Elect Brown’s Win Adds More Question Marks to Senate Climate Debate*, N.Y. TIMES, Jan. 20, 2010, <http://www.nytimes.com/cwire/2010/01/20/20climatewire-sen-elect-browns-win-adds-more-question-mark-48190.html>.

104. See *supra* Part II.C.

105. Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1521–22 (codified in scattered sections of 42 U.S.C.); see BRENT D. YACOBUCCI & KELSI S. BRACMART, CONGRESSIONAL RESEARCH SERVICE CALCULATION OF LIFECYCLE GREENHOUSE GAS EMISSIONS FOR THE RENEWABLE FUEL STANDARD 1 (2009), available at <http://ncseonline.org/NLE/CRSreports/09July/R40460.pdf>.

106. § 202, 121 Stat. at 1524–25 (to be codified at 42 U.S.C. § 7545(o)(4)); see Regulatory Announcement, U.S. Env’tl. Prot. Agency Fact Sheet: EPA Proposes New Regulations for the National Renewable Fuels Standards Program for 2010 and Beyond (May 26, 2009), available at <http://www.epa.gov/OMS/>.

RFS does not establish precedent for any additional regulation of CO₂ under other CAA provisions: “Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas . . . for purposes of other provisions (including section 7475) of this chapter.”¹⁰⁷

III. CONCLUSION

Perhaps it is too much to expect an administrative agency to question a court decision that dramatically expands the scale and scope of its power. Nonetheless, the Supreme Court of the United States is not infallible, and the Tailoring Rule abundantly confirms that *Massachusetts v. EPA* set the stage for economic disaster.

When a court decision leads to absurd results, there are but two possibilities: (1) the statute was badly drafted, and the court brought the inherent conflicts to light, or (2) the court conjured up the absurd results by misreading the statute.

The absurd results the Tailoring Rule aims to avoid are entirely a product of *Massachusetts v. EPA*. The real issue in the case, which the Court never faced, was whether Congress, when it enacted and amended CAA section 202, intended for EPA to apply the Act *as a whole*, including PSD and Title V and the NAAQS program, to CO₂ for the purpose of mitigating global warming. To ask that question is to answer it.

That the Tailoring Rule will survive judicial challenge is doubtful, because it so obviously flouts unambiguous statutory language. Even if it survives, it will not protect the U.S. economy from the regulatory fallout of *Massachusetts v. EPA*. As noted, litigation groups have already petitioned EPA to set NAAQS for GHG emissions at 350 ppm.¹⁰⁸ What will EPA do when the NAAQS lawsuits start? Will it propose another “tailoring rule” to re-imagine the NAAQS compliance deadline as 50 or 100 years instead of 5 or 10?

107. 42 U.S.C. § 7545(o)(12) (Supp. I 2009).

108. Nathan Richardson, *Regulating GHGs: Can the EPA Dodge a Train?*, WEATHER-VANE, <http://www.rff.org/wv/archive/2009/12/07/regulating-ghgs-can-the-epa-dodge-two-trains.aspx> (last visited Feb. 25, 2010).

Our constitutional system works only when each branch of government responsibly exercises and jealously guards its own institutional prerogatives. Many in Congress, however, applauded *Massachusetts v. EPA*, viewing it as way to “enact” CO₂ controls without having to vote for such measures or take responsibility for their costs.¹⁰⁹ Such ceding of legislative power to non-elected litigators, judges, and bureaucrats endangers self-government and representative democracy.

The irony is that *Massachusetts v. EPA* could eventually burn those who welcomed it as a politically expedient way to end-run the legislative process. Blame for the economically-crippling effects of a PSD administrative nightmare and/or NAAQS regulation of CO₂ would fall directly on the current presidential administration, with the majority in Congress also taking heat from the backlash.

There will be several legislative remedies to thwart this abdication of congressional responsibility. The most prominent to date are bills introduced by Sen. Lisa Murkowski (R-AK) and Rep. Marsha Blackburn (R-TN). Sen. Murkowski has introduced a bipartisan resolution of disapproval, pursuant to the Congressional Review Act,¹¹⁰ to veto the legal force and effect of EPA’s endangerment finding.¹¹¹ This one-sentence bill has 40 co-sponsors.¹¹² Rep. Blackburn’s H.R. 391 would amend CAA section 302(g) by adding the following: “The term ‘air pollutant’ shall not include carbon dioxide, water vapor, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, or sulfur hexafluoride.”¹¹³ The bill also provides: “Nothing in the Clean Air Act shall be treated as authorizing or requiring the regulation of climate change or global warming.”¹¹⁴ This two-sentence bill now has 152 co-sponsors.¹¹⁵ If enacted, either the Murkowski or Blackburn bill would protect the U.S. economy and reassert Congress’s responsibility for national policymaking.

109. See, e.g., *Energy and Commerce Hearing*, *supra* note 23, at 1–2 (statement of G.K. Butterfield, Vice Chairman, H. Subcomm. on Energy and Air Quality).

110. 5 U.S.C. §§ 801–08 (2006).

111. S.J. Res. 26, 111th Cong. (2010).

112. For a listing of co-sponsors to S.J. Res. 26, visit <http://www.thomas.gov> (search “Bill Summary & Status” for “S.J. Res. 26,” then follow “Cosponsors” hyperlink).

113. H.R. 391, 111th Cong. (2009).

114. *Id.*

115. For a listing of co-sponsors to H.R. 391, visit <http://www.thomas.gov> (search “Bill Summary & Status” for “H.R. 391,” then follow “Cosponsors” hyperlink).
